In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 56.

PENNSYLVANIA RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

vs.

N. P. RYCHLIK,
Individually and on Behalf of and as Representative of Other Employees of The Pennsylvania Railroad,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

and

BRIEF OF AMICUS CURIAE.

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Text.

Statutes.

Reports.

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Now comes Brotherhood of Locomotive Engineers and respectfully moves the Court for leave to file a brief amicus curiae in the above entitled cause, and as grounds therefor respectfully shows:

This Brotherhood states that it is a railway labor organization representing railway employees in engine service, principally locomotive engineers, and that through its General Committees of Adjustment it is the craft representative of locomotive engineers on approximately 98% of the mileage of the principal railroads of the United States.

Section 2, Eleventh, of the Railway Labor Act is the so-called Union Shop Amendment of the Act which be-

came effective January 10, 1951, and paragraph (c) thereof (45 U. S. C. 152, Eleventh (c)) relates specifically to railroad employees in engine, train, yard or hostling service. The interpretation and construction of said paragraph (c) is of particular and vital importance to employees in engine service and to this Brotherhood as the representative of such employees. The construction of the Railway Labor Act and its effect upon the Union Shop Amendment thereof as made by the court below is directly opposed to the interests of this Brotherhood as a union representing railroad employees in engine service.

The Brotherhood wishes to file a brief in support of the contention that the Railway Labor Act provides an adequate administrative remedy for determining whether a labor union is national in scope and organized in accordance with the Act for the purposes of the Union Shop Amendment of that Act.

The Brotherhood of Railroad Trainmen, one of the petitioners for the writ of certiorari herein, which petition was granted by the Court, asserted the above contention in said petition, and the brief of this Brotherhood would be in support of such position of the Brotherhood of Railroad Trainmen.

The Brotherhood of Locomotive Engineers does not at this time know what arguments and authorities the petitioners will present on the merits of the case as contended for by it, but believes that the argument to be presented by this Brotherhood would be supplemental and in addition to arguments presented by the Brotherhood of Railroad Trainmen. This Brotherhood at present is a defendant in litigation now pending within the Second Circuit in the United States District Court for the Southern District of New York which involves questions similar, and in some respects substantially identical, to questions

presented in the instant litigation, and for that reason is especially interested in the instant case.

Written consent of the petitioners to the filing of this brief has been obtained and is herewith filed with the Clerk of this Court. Consent of the respondent to the filing of this brief was refused.

Dated at Cleveland, Ohio, this 21st day of September, 1956.

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BRIEF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS AMICUS CURIAE.

STATEMENT.

This brief is filed on behalf of the Brotherhood of Locomotive Engineers (hereinafter sometimes called "Brotherhood" or "BLE"), which is a labor organization in the railroad industry, national in scope and organized in accordance with the Railway Labor Act. As such it participates in the selection and designation of members of the National Railroad Adjustment Board in accordance with the provisions of Section 3, First, of the Railway Labor Act (45 U. S. C. 153, First). It has one representative on the First Division of the National Railroad Adjustment Board.

Since the enactment of the Union Shop Amendment to the Railway Labor Act, effective January 10, 1951 (45 U. S. C. 152, Eleventh), numerous union shop agreements have been negotiated with the carriers by General Committees of Adjustment of the Brotherhood. Members of the Brotherhood in the employ of railroads are all engaged in engine service, and the Brotherhood of Locomotive Engineers is the craft representative of locomotive engineers on approximately 98% of the mileage of the principal railroads of the United States. In 45 U. S. C. 152, Eleventh (c), it is provided that

> "The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in Section 3, First (h), of this Act (45 U. S. C. 153, First (h)) defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; * * *."

The question of the determination of whether an organization which is not the craft representative meets the requirements of the section quoted, that is, whether such organization is national in scope and organized in accordance with the Railway Labor Act, is of great importance to this Brotherhood. This brief is directed to a consideration of such question.

From the complaint, the affidavit and exhibits attached thereto, the following pertinent facts appear:

Petitioners, Brotherhood of Railroad Trainmen (BRT) and Pennsylvania Railroad Company, on March 26, 1952, and effective April 1, 1952, entered into a union shop agreement as authorized by Section 2, Eleventh, of the Railway Labor Act (45 U. S. C. 152, Eleventh) (R. 12). This agreement provided that all employees in the classes represented by BRT would be required to be members of that organization within sixty days (R. 13), but further provided, as required by Section 2, Eleventh (c) of the Railway Labor Act, that such membership requirement would not be applicable to employees "who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act, and admitting to membership employees of a craft or class in engine, train, yard, or hostling service," and that nothing contained in the agreement should "prevent an employee from changing membership from one organization to another organization admitting to membership employees of the craft or class in any of the said services" (R. 13).

Respondent Rychlik had been a member of the BRT but resigned from that membership in February 1953 and became a member of United Railroad Operating Crafts (UROC) which respondent "fully believed, in good faith, to be a railroad union national in scope" (R. 10). Respondent later, on July 31, 1954, became a member of the Switchmen's Union of North America, "a union which is uniformly recognized as being national in scope, as that term is employed in the Railway Labor Act" (R. 5, 11). In accordance with the provisions of paragraph 5(a) of the Union Shop Agreement (R. 14), respondent, "some time after February of 1953," was cited for non-compliance with the membership requirements of the Union Shop

Agreement (R. 10). He was given a hearing with respect thereto on August 27, 1953 (R. 10), at which time the hearing was postponed "until such time as there might be a more conclusive determination as to whether the said UROC was in fact a union national in scope" (R. 11). A further hearing was had on August 23, 1954, at which time respondent "gave evidence of the fact" that he had been a member of the Switchmen's Union since July 31, 1954 (R. 11).

The aforementioned hearings were held before the System Board of Adjustment (R. 10, 11), provided for in paragraph 7 of the Union Shop Agreement, which Board was composed of four members, of whom two were appointed by the petitioner carrier and two by the BRT (R. 15).

By letter dated January 3, 1955 from the System Board of Adjustment, respondent was informed that "following thorough review, consideration and discussion of the evidence," the Board concluded "that membership in the United Railroad Operating Crafts does not constitute compliance with the Union Shop Agreement," and that the decision of the Board was that respondent "has not complied with the membership requirement for continued employment as set forth in the Union Shop Agreement effective April 1, 1952" (R. 17, 18). Under date of January 14, 1955, the carrier's superintendent advised respondent that, in accordance with the decision of the System Board of Adjustment, respondent's service would be terminated as of January 14, 1955 (R. 18).

The District Court, upon motion of the petitioners, dismissed the complaint upon the ground that it failed to state a cause of action (R. 36). In the opinion of the District Court (R. 22 ff), reported 128 F. Supp. 449, it was

held that the Union Shop Agreement was not invalid by reason of the fact that it provided for a System Board consisting of two representatives from the carrier and two from the BRT; that there was no allegation in the complaint or proof submitted that there had been any discrimination against respondent by any member of the Board. It stated that the Act contemplated continued membership in a qualified union and that that question was one for proper determination in the first instance by the System Board of Adjustment; that it was not necessary for the Court to decide upon the facts submitted whether UROC is a labor organization national in scope, and then stated that under the Railway Labor Act the function of deciding such question is left to special specific administrative procedure provided in Section 3 of the Act (45 U. S. C. 153, First (f)), reading as follows:

> "In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring par-

ticipation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding."

The United States Court of Appeals for the Sixth Circuit, in *Pigott v. D. T. & I. R. R. Co.*, 221 F. 2d 736, affirming the District Court for the Eastern District of Michigan in the similarly entitled case (116 F. Supp. 944), a case substantially identical to the instant case in its fact situation, held similarly (p. 740) that "whether a labor organization is 'national in scope' is well suited to administrative definition," and that the determination by a three-man board, provided for in Section 3, First (f), of the Railway Labor Act, would be conclusive as to whether a union has the right to select members of the National Railroad Adjustment Board, and that such determination would have a prospective universal application, including application to the union shop provision of the Act dealing with the question of whether a union was national in scope.

Although it was claimed in the *Pigott* case, as here, that a hearing before a System Board, composed in part of representatives of the union, did not afford due process, the Court of Appeals for the Sixth Circuit held that there was no denial of due process since there was available the remedy provided in Section 3, First (f), for determining whether a union was national in scope.

A similar view was taken by the United States Court of Appeals for the Seventh Circuit in the case of *UROC v. Pennsylvania RR. Co.*, 212 F. 2d 938.

In the instant case the United States Court of Appeals for the Second Circuit (229 F. 2d 171) disagreed

with the decisions of the Courts of Appeals for the Sixth and Seventh Circuits and held that the administrative procedure of Section 3, First (f), of the Act was not an adequate remedy.

QUESTIONS PRESENTED.

Petitioners and respondent do not agree upon a statement of the questions presented for determination in this case. From a consideration of the record herein and the statements of the questions presented as made by counsel for opposing parties, this Brotherhood believes the substantial question for determination herein is whether the administrative method provided in Section 3, First (f), of the Railway Labor Act (45 U. S. C. 153, First (f)) for deciding eligibility to participate in the selection and designation of the labor members of the National Adjustment Board, is also the proper and exclusive method for determining whether an organization is national in scope and organized in accordance with the Railway Labor Act as required by the provisions of the Union Shop Amendment.

This brief supports the view that Section 3, First (f), of the Railway Labor Act provides an available and adequate administrative remedy for determining this question.

SUMMARY OF THE ARGUMENT.

When a union shop agreement authorized by the 1951 amendment of the Railway Labor Act has been entered into between a carrier and the representative of a craft of operating employees, all employees in the craft are required to become members of the craft union or of another union admitting members of such craft which is national in scope and organized in accordance with the Railway Labor Act. The phrases "national in scope" and "organized in accordance with the Act" in the 1951 amendment are identical with phrases used in the 1934 amendment of the Act, which 1934 amendment also provided an administrative method for determination of whether a union was national in scope and organized in accordance with the Act for the purposes of the 1934 amendment. A union found to be national in scope for the purposes of that amendment would also be national in scope for the purposes of the Union Shop Amendment.

This administrative procedure affords a conclusive method of determination of the status of the union, and since it is available to any union claiming to come within the provisions of the Act for the purpose of choosing members of the National Railroad Adjustment Board, it should be held to be the method for determination whether a union is national in scope for the purposes of the Union Shop Amendment to the exclusion of such determination by the courts. The Act should be read as a whole to the end that when an organization is found to be national in scope it shall be such for all purposes of the Act. The exclusive method of 153, First (f), will accomplish this. Judicial determination for purposes of the Union Shop Amendment alone will not do so.

The use of the administrative method is in accord with the purposes of the Railway Labor Act, and in accord with

decisions of this Court that resort should not be had to the courts to settle disputes under the Railway Labor Act when an administrative remedy is available or unless there is an explicit judicial remedy.

ARGUMENT.

The decisions of this Court hold that when there is available an adequate administrative remedy such remedy excludes jurisdiction of the courts.

It is no novelty in legal procedure for courts to refuse to grant relief to litigants who have failed to exhaust available non-judicial remedies. When members of clubs, religious organizations, labor unions or fraternal societies have complained of grievances arising within such organizations, and where the rules or laws of such organizations provide a method for redress of the grievances within the organizations, courts have consistently refused to decide such controversies when members have failed to seek the redress provided by the organizations' laws or tribunals. *International Union of Steam and Operating Engineers, et al. v. Owens*, 119 O. S. 94; *Engel v. Walsh*, 258 Ill. 98; *Puleio v. Sons of Italy, etc.*, 266 Mass. 328. Even when such remedies have been pursued within the organizations the courts have refused to interfere with the decisions of the organizations' tribunals in the absence of fraud, collusion, bad faith, or arbitrariness. *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U. S. 1.

Where there is a prescribed statutory administrative remedy this Court has held that judicial relief will not be granted until such administrative remedy has been exhausted, even where contention is made that the administrative body lacked power over the subject matter. *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 51.

With respect to administrative remedies provided in

the Act here involved, to wit, the Railway Labor Act, this Court has held that the administrative remedy to be found in the National Railroad Adjustment Board excludes a court from deciding grievances. *Order of Railway Conductors v. Pitney*, 326 U. S. 561; *Slocum, etc. v. D. L. & W. R. Co.*, 339 U. S. 239; *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255. Claimants, who choose to submit their grievances to an established tribunal, are required to present them to the Adjustment Board rather than to the courts, although the language of the Railway Labor Act appears to be permissive rather than mandatory. In 45 U. S. C. 153, First (i), it is provided that after the handling of disputes in the regular manner with the officer of a carrier the disputes "may be referred" to the Adjustment Board. Thus it appears that it is the existence of an available remedy rather than a specific requirement that the remedy must be pursued which excludes the jurisdiction of the courts in such matters.

Further, with respect to the provision of the Railway Labor Act (45 U. S. C. 152, Ninth) where the National Mediation Board has the duty of certifying the designation of a craft representative and is given the authority to take a secret ballot of employees involved for the purpose of determining representation and of designating who may participate in the election, this Court has held that such determination by the National Mediation Board is not reviewable by the courts. *Switchmen's Union of North America, etc. v. National Mediation Board*, 320 U. S. 297.

As we understand various expressions of this Court in the cases of *Switchmen's Union, etc. v. National Mediation Board, supra, General Committee, BLE v. M. K. T. R. Co.*, 320 U. S. 323, and *General Committee, BLE v. Southern Pacific Co.*, 320 U. S. 338, all of which cases were

decided at the same time, they are to the general effect that Congress, in the absence of a plain statutory remedy, did not intend to have the courts resolve disputes in the railroad industry and particularly those arising under the Railway Labor Act. Thus it is said in *General Committee, BLE v. M. K. T. R. Co. supra,* at p. 333:

> "The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

And again at p. 337:

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied."

Certainly no specific judicial remedy is set forth in the Railway Labor Act for deciding the question of whether a labor union is national in scope. On the contrary, a specific administrative remedy is provided in the Act for determining that question. (45 U. S. C. 153, First (f).) The method is there provided for a decision by a Board of three, one to be chosen by each of the interested parties and the third or neutral member to be chosen by the National Mediation Board, it is substantially identical with the method chosen for determination of disputes by arbitration. Its fairness has not been questioned, and we believe is not open to question.

The administrative procedure of 45 U. S. C. 153, First (f), is a rational and adequate method for determining whether a union is national in scope for the purposes of agreements made under the Union Shop Amendment.

The Court of Appeals for the Sixth Circuit in *Pigott v. D. T. & I. R. R. Co.*, 221 F. 2d 736, found the administrative procedure of 45 U. S. C. 153, First (f), for a determination of whether an organization is national in scope and organized in accordance with the Act by a board of three, the neutral member of which is to be appointed by the National Mediation Board, to be an available and adequate remedy to determine whether a labor organization is national in scope for purposes of the Union Shop Amendment (45 U. S. C. 152, Eleventh). The Court of Appeals for the Second Circuit in the instant case did not agree with the conclusion of the court for the Sixth Circuit.

In order that an organization may participate in the selection of members of the National Railroad Adjustment Board it must be "national in scope" and "be organized in accordance with the provisions of Section 2" of the Act (45 U. S. C. 153, First (a)). In order that an operating employee who is not a member of the union holding the representation of the craft on a carrier, may meet the union membership requirements of the Act and of the agreement in this case, he is required to hold membership "in any one of the labor organizations, national in scope, organized in accordance with this Act" which admits to membership employees in one of the operating crafts or classes (45 U. S. C. 152, Eleventh (c)). When a dispute arises as to whether an organization is eligible to participate in the selection of members of the Adjustment Board, such dispute may be decided by a board of three, one chosen by each of the interested parties and the third, or

neutral, member chosen by the National Mediation Board, and the persons so chosen, constituting a board of three "shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with Section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding" (45 U. S. C. 153, First (f)). Since by the requirements of Section 153, First (a), an eligible organization must be national in scope, this requirement will likewise apply to any elector found eligible by the board of three. Thus, the eligibility requirements of both Sections 152, Eleventh (c) and 153, First (a) and (f), are substantially alike.

The Court of Appeals for the Second Circuit (221 F. 2d 171, 174) purported to find that in the event the procedure of Section 153, First, should be followed with respect to union eligibility under the Union Shop Amendment, and a negative finding should be made by the board of three, such board might fail to make a specific finding that the union was not national in scope, so that it would be "impossible to know whether this fact was itself ground for refusal."

The reasoning and conclusion of the court appear to us to be unrealistic. Since the requirements of Section 153 for eligibility in participation of selection of the Adjustment Board are specific that an eligible organization must be national in scope and organized in accordance with the Act, it is inconceivable that the board of three, if it denied eligibility, would fail to state that the Union was not national in scope or was not organized in accordance with the Act. The board of three is required to "in-

vestigate the claims of the labor organization desiring participation and to decide whether or not it was organized in accordance with Section 2 of the Act." No investigation worthy of the name would fail to disclose whether the applicant organization was national in scope and organized in accordance with the Act. Since two of the members of the board of three would be partisan members, the claims of both sides on all points involved in eligibility would be fully presented. The Board would be required to inquire into whether the organization was national in scope because Section 153, First (f) of the Act requires the Board to determine not only whether the applicant Union is organized in accordance with Section 152 but also whether it is "otherwise properly qualified to participate in the selection of labor members." Since there would be opposing contentions before the Board we think it would be practically impossible to give any substance to a view that the Board would not state its reasons with respect to whatever decision it might render.

The Second Circuit Court of Appeals also purported to see a defect in the remedy of 153, First (f), in the possibility that the "competing" union might not wish to be an elector of members of the Adjustment Board and therefore the employee would have no recourse under that remedy if the competing union saw fit not to apply for such eligibility. It would appear to us that if the so-called competing union would be so little interested in using available procedure to have itself declared an eligible union to meet the requirements of the Union Shop Amendment it would not be such an organization that the member should ever have placed any trust therein. Employees who have so little interest in their own welfare that they are willing to risk their all with respect to employment on an organization so faithless that it will not seek to protect the interest of its members are not entitled to the protec-

tion of the court. As was said by the United States District Court for the District of Maryland in *Alabaugh v. Baltimore and Ohio Railroad Company, et al.*, 125 F. Supp. 401, 407, aff. 222 F. 2d 861, cert. den. 350 U. S. 839:

> "Plaintiffs voluntarily stopped paying dues to Brotherhood (BLE) and terminated their membership therein, in order to join and be active in a rival union. Plaintiffs gambled heavily for a stake which must have seemed worth the risk to them at that time. By terminating their membership in Brotherhood and ceasing to pay dues to it, they made themselves subject to discharge by B & O under the terms of the union shop agreement, unless they could show that UROC was a labor organization which qualified under section 152 Eleventh (c). They could have hedged their bet by continuing to pay dues to Brotherhood after joining UROC, pending determination of UROC's status. If they had continued to pay dues to Brotherhood, that union might have expelled them for dual unionism, but B & O could not have discharged them, in view of the provisions of section 152 Eleventh (c). They would have continued in their employment as 'free riders.' But they chose to stake all on UROC."

The method of 153, First (f), for determining whether a union is national in scope is a sure and certain method for obtaining uniformity on that point. If the matter of such determination is for the National Railroad Adjustment Board, or system boards as to those carriers where such boards are established, there is likelihood of diversity of view on this vital and fundamental point. If the qualification of "national in scope" is definitely determined under 153 First (f), there are still other points which would be left for determination by system boards or the National Railroad Adjustment Board which would apply specifically to the individual cases, as for example, whether the employee was in good standing in his union, whether

he had become a member of a union within the required time, or whether he had lost membership for reasons other than non-payment of dues, etc. There should be no variation in the fundamental condition whether the union in which the employee claimed to be a member met the requirements of the Act. Only the circumstances applicable to a particular individual's case should be left for determination by the Boards. Resort to the statutory remedy of 153, First (f), will solve all of the problems as to the eligibility of a union with respect to union membership requirements, and since it is available to all organizations which seek to compete in this field it should be held that the method set up in that section of the statute is an applicable and exclusive method for determining the basic question of whether an organization is national in scope and organized in accordance with the Railway Labor Act.

The legislative history and the proper construction of the Railway Labor Act support the contention that the method for determining whether a union is national in scope and organized in accordance with the Railway Labor Act as provided in 45 U. S. C. 153, First (f), is the exclusive method for determining the same matters with reference to the Union Shop Amendment (45 U. S. C. 152, Eleventh (c)).

Section 3 of the Railway Labor Act (45 U. S. C. 153) was one of the 1934 amendments to that Act. By this section there was first established the National Railroad Adjustment Board for the settlement of claims and grievances between carriers and their employees. The composition of that Board and the method of selecting members of that Board were specified in the section. Membership of the Board and of each Division thereof is to be divided equally between carrier representatives and labor representatives. The labor members are to be chosen

by "such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act" (45 U. S. C. 153, First (a)). The First Division of the Board has jurisdiction over disputes involving engine, train and yard service employees and includes engineers and firemen. It consists of ten members, five of whom "shall be selected and designated by the national labor organizations of the employees" (45 U. S. C. 153, First (h)). In event of dispute as to eligibility to participate in the selection of the labor members determination of eligibility is provided for in 45 U. S. C. 153, First (f) and, as hereinbefore mentioned, provides for a final decision on this matter by a board of three, provided that the Secretary of Labor has first investigated the claim of an applicant labor organization and has recommended that the claim has merit. The board of three is composed of one representative chosen by the national labor organizations already qualified, one representative chosen by the claimant, and a third neutral representative chosen by the National Mediation Board. The board of three is to decide whether or not the claimant "was organized in accordance with Section 152" of the Act and "is otherwise properly qualified to participate in the selection of labor members of the Adjustment Board." Hence the board of three is to decide whether the claimant is organized in accordance with Section 152 of the Act and is national in scope as required by Section 153, First (a).

The same phrases, to wit, "national in scope" and "organized in accordance with this Act" are found in the Union Shop Amendment effective January 10, 1951 (45 U. S. C. 152, Eleventh (c)). There is no new method provided in the Union Shop Amendment for determining what is meant by "national in scope" or "organized in ac-

cordance with the Act." The only reasonable conclusion, therefore, appears to be that when Congress used the same terms in the later Amendment, it intended the same meaning for them as used in the earlier amendment and the same methods provided therein for determining organization eligibility within those terms. As was pointed out by the District Court in *Pigott v. D. T. & I. R. R. Co.*, 116 F. Supp. 949, 952:

> "However, Section 152, Eleventh, is silent as to the manner in which these qualifications are to be determined. On the other hand, Section 153 establishes a specific administrative procedure for that purpose. There is a compelling inference that, when the identical qualifications of Section 153 were incorporated into Section 152, Eleventh, the drafters of this amendment also had the administrative procedure of Section 153 for determining these qualifications clearly in mind."

One of the principal reasons for the adoption of the Union Shop Amendment was the desire and intention of the proponents of the amendment to have all workers in the crafts pay their proportionate cost of the activities of the unions which resulted in benefits to all employees alike whether members of the organizations or not. Up to the time of the Union Shop Amendment the cost of union activities had been borne entirely by the membership of the unions but all increases in pay and improvements in working conditions were enjoyed by non-members who thus became and are often known as "free riders."

One of the principal spokesmen before the committees of Congress in favor of the adoption of the Union Shop Amendment was George M. Harrison, President of the Brotherhood of Railway and Steamship Clerks, Freight

Handlers, Express and Station Employees. He appeared before the committees of both the Senate and the House of Representatives. In his statement on H. R. 7789 before the Committee on Interstate and Foreign Commerce of the House of Representatives, 81st Congress, 2d Session, Mr. Harrison testified, beginning at page 10 of the Report of the Hearings:

> "Activities of labor organizations resulting in the procurement of employee benefits are costly, and the only source of funds with which to carry on these activities is the dues received from members of the organization. We believe that it is essentially unfair for nonmembers to participate in the benefits of these activities without contributing anything to the cost. This is especially true when the collective-bargaining representative is one from whose existence and activities he derives most important benefits and one which is obligated by law to extend these advantages to him."
>
> "Furthermore, collective bargaining to the railroad industry is more costly from a monetary standpoint than that carried on in any other industry. The administrative machinery is more complete and more complex. The mediation, arbitration and Presidential Emergency Board provisions of the Act, while greatly in the public interest, are very costly to the unions. The handling of agreement disputes through the National Railroad Adjustment Board also requires expense which is not known to unions in outside industry."

This reason for enactment of the amendment was conveyed to the Congress as shown in the remarks of Congressman Linehan, a member of the Committee on Interstate and Foreign Commerce in the debate which occurred just shortly prior to the passage of the amendment by the House. His remarks were in part as follows:

"Mr. Speaker, I believe that the principle of the union shop—as embodied in the proposed legislation before us—is 100 per cent American.

"It reflects the American spirit of fair play. It provides that those who accept the benefits secured by an organization shall also share equally in the expense of operating such organization.

" 'Free riders'—those who seek to get something for nothing, are resented in every walk of life, and justly so. We all believe no man should shirk his responsibility. * * *

"This measure is the very essence of democracy. It encourages 100 per cent membership and 100 per cent participation in the activities of the union. * * *

"This bill will also enhance peace on the rails. It will remove a major source of irritation and unrest. As I said earlier, railroad workers who regularly and loyally tender their dues to support their unions resent the 'free riders' in their midst—the men who take the gains which unions win through long and costly struggles but refuse to pay one penny towards the expense involved." (96 Cong. R. 17058.)

It thus appears that it was the intention of the Congress, in adopting the Union Shop Amendment, to permit agreements requiring all employees in a craft to share proportionately in the cost of administering the provisions of the Railway Labor Act concerning the craft. This view was adopted and approved by the District Court and by the Court of Appeal for the Sixth Circuit in the *Pigott* case. The Court of Appeals quoted the District Court (221 F. 2d, at 741):

"This result is consonant with the intention of the drafters of the Union Shop Amendment that a labor organization shall not be entitled to enlist employees on the basis of the privileged standing accorded to qualified unions in Section 152, Eleventh, until it has assumed its fair share of the burdens

and responsibilities attendant upon the administration of the Act,"

and then added:

"* * * including the considerable financial burden required of the labor organizations participating in the administrative machinery of the Railway Labor Act."

The Court of Appeals then quoted the District Court further:

"Thus, a labor organization must exert itself, at least to the extent of participation in the Adjustment Board machinery, before it is so entitled."

The conclusion thus seems mandatory that the phrases "national in scope" and "organized in accordance with the Act" include the requirement that such a union shall be required to assume its duty of establishing its eligibility to participate in the selection of members of the National Railroad Adjustment Board. Before it has so established its eligibility, it has not assumed its due responsibility under the Act, and it cannot be said to be national in scope and organized in accordance with the Act. To conclude otherwise would create an immunization of the "free rider" status of the members of such a non-participating labor organization, and thus defeat the underlying principle of the Union Shop Amendment.

There is no valid reason for assuming that Congress intended to have any different meaning given in the union shop amendment to the concept of "national in scope" and "organized in accordance with the Act" from the meaning given thereto in the 1934 amendments to the Act (Cf. *Atlantic Cleaners and Dyers v. United States,* 286 U. S. 427, 433), and hence, as the District Court said in the *Pigott* case, there is a compelling reason for concluding that the determination of whether an organization

is national in scope within the intent of the union shop amendment is to be made by the same method provided in the 1934 amendment in Section 153, First (f), of the Act.

In 1 *Sutherland on Statutory Construction*, 3rd Edition, Section 1934, p. 430, it is said:

> "In accordance with the general rule of construction that a statute should be read as a whole, as to future transactions, the provisions introduced by the amendatory act should be read together with the provisions of the original section that were re-enacted in the amendatory act or left unchanged thereby, as if they had been enacted as one section. Effect is to be given to each part, and they are to be interpreted so that they do not conflict. If the new provisions and the re-enacted or unchanged portions of the original section *cannot be harmonized* the new provisions should prevail as the latest declaration of the legislative will. In the absence of express evidence to the contrary, the new provisions are applicable only to the unchanged portions of the original section, *and have the same scope.*" (Emphasis supplied.)

And in Section 1935, p. 432, it is said:

> "Words used in the unamended sections are considered to be used in the same sense in the amendment. And accordingly, a change in phraseology indicates a change in meaning. The legislature is presumed to know the prior construction of the original act or code, and if previously construed terms in the unamended sections are used in the amendment, it is indicated that the legislature intended to adopt prior construction as to the terms used in the amendment."

In *Kepner v. United States* (1904) 195 U. S. 100, 124, this Court said:

> "It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is

presumed to be used in that sense by the legislative body."

While it does not appear that "national in scope" and "organized in accordance with this Act" had at the time of the enactment of the Union Shop Amendment been judicially construed, there is nothing to be found in the discussion in Congress by the proponents of the bill or others which would indicate that these phrases were not to be used in the same sense in which they had been used in the 1934 amendment. Since the identical phraseology is used, and since a method had been provided in the 1934 amendment for a determination of whether a union met these requirements, we believe logic and reason require the conclusion heretofore reached by the Courts of Appeals for the Sixth and Seventh Circuits that the method of Section 153, First (f), should be followed in determining union eligibility under the Union Shop Amendment. So to construe the Act is "to read (the Act) as a whole."

Among the primary general purposes of the Railway Labor Act as set forth in Section 2 thereof (45 U. S. C. 152) are the following:

> "(2) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions.
>
> (5) To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions."

Congress intended the Act to be "an instrument of peace rather than of strife." *Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 570.

To leave the question of whether a union is national in scope to be determined by the courts in each individual

case of alleged non-compliance with the Union Shop Amendment is to promote strife and injure morale among employees. Constant, or at least frequent, litigation over that point would continue to be the result of that course. On the other hand, to use the available method of Section 153, First (f) will "remove a major source of irritation and unrest" and avoid strife. A firm understanding that the provisions of Section 153, First (f) form a required procedure for determining whether a union is national in scope will definitely promote and "enhance peace on the rails."

It was well known to the members of the committees of the Senate and House of Representatives which were considering the amendment just what type of organization was included in the phrases "national in scope" and "organized in accordance with the Act," and this was particularly true with reference to the operating organizations which were specifically identified to the committees in the testimony of witnesses and to the Congress in the course of the debates. These organizations were identified by name as the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railroad Conductors of America, Brotherhood of Railroad Trainmen, and Switchmen's Union of North America (Hearings on H. R. 7789, *supra*, p. 35) all of which were known to be organized on a national scale and completely free in their organization of any influence on the part of the carriers. Not only are they and were they organized on a national scale with respect to their membership but they likewise held, and hold, substantially all of the craft representation in the operating crafts on the principal railroads of the United States (Twentieth Annual Report of National Mediation Board p. 31).

In dealing with these organizations carriers were well

aware, from long experience, that they came within the requirements of "national in scope" and "organized in accordance with the Act." It could not have been the intention of Congress to impose on the carriers a duty to negotiate concerning union shop agreements which provided for membership in organizations national in scope but not acting as craft representative without providing a method for determining whether such organizations were national in scope. Since a complete and adequate method was already found in the Act, there was no need for a further provision in the union shop amendment concerning such determination.

Section 153, First (f), provides a method of determination uniform in effect. A method of determination by the judicial process would give rise to a hodge-podge of results. If the determination were open to the courts it would be possible and probable to have a particular organization found national in scope in one circuit while at the same time it was found not to be national in scope in another circuit. Similarly, the same organization might be found in different circuits and at different times to be national in scope or not national in scope. The provisions of Section 153, First (f), afford a method for a single determination which would remain in effect throughout the entire country until a change had been made under the same provisions by a subsequent proceeding.

Upon general principles of consideration of the legislative developments, and particularly in the light of the expressions of this Court to the effect that the judicial remedy should not be invoked when an adequate remedy is to be found in the Act, we submit that the remedy of Section 153, First (f), should be held to be the exclusive method for determination of the question presented in this litigation.

CONCLUSION.

Respondent of his own election chose to risk his employment rights by giving up membership in a union recognized as national in scope for membership in a union which had not qualified under the administrative procedure as national in scope and was not in compliance with the terms of the Union Shop Amendment.

The decision of the Court of Appeals for the Second Circuit should be reversed, and the decision of the District Court dismissing the complaint for failure to state a claim upon which relief could be granted should be affirmed and reinstated.

Respectfully submitted,

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APPENDIX.

Pertinent Provisions of Railway Labor Act 45 U. S. C. 151 ff.

"GENERAL PURPOSES.

"Sec. 152.

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"Sec. 152. Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect

to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act

and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

"Sec. 153. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"Sec. 153. First (f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and

designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

"Sec. 153. First. (h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees."

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